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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. REAGAN THOMAS, Defendant and Appellant.	C068158 (Super. Ct. No. SF111216A)

At issue in this case is whether defendant's conviction for *first* degree robbery can stand where the final accusatory pleading charged only *second* degree robbery. Under the unique circumstances of this case, which we hope will never recur, we conclude the answer is "yes."

Defendant also contends the trial court erred in using the same 2002 burglary conviction for both a five-year prior serious felony enhancement (Pen. Code, § 667, subd. (a)) and one-year prior state prison term enhancement (Pen. Code, § 667.5, subd. (b)). The People concede the error. We agree with the parties

and shall stay one of the one-year enhancements and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Given the limited contentions on appeal, we recount only facts relating to the robbery. When Shari G. returned home with her children, defendant was waiting in her attached garage with a gun.[1] He told her to go into the house where he had her put various items such as jewelry, a camera, a laptop computer and video games in bags. Later, defendant returned most of the property, except the jewelry, and took a generator from the garage.

Defendant admitted he took property from Shari G.'s house, but claimed she gave it to him so he could buy more drugs.

The complaint charged defendant with first degree robbery[2] and other crimes. At the preliminary hearing, Shari G. testified defendant took items at gunpoint while inside her house. Based on this testimony, the court found probable cause to hold defendant to answer on first degree robbery.

The information charged defendant with multiple crimes, including first degree robbery. It alleged defendant "did

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[1] Because a sex crime was charged, Shari and her children were not called by their full names at trial.

[2] First degree robbery includes "every robbery which is perpetrated in an inhabited dwelling house" under Penal Code section 212.5, subdivision (a). We note with disapproval that although the complaint charged first degree robbery from an ATM, there was no ATM in this case. This case is characterized by a disconcerting lack of care in drafting charging documents.

willfully, unlawfully and by means of force and fear take personal property from the person, possession, and immediate presence of SHARI G., and said offense was perpetrated in an inhabited dwelling house . . . ." An amended information included the same charge.[3]

The day before the trial commenced, the prosecutor indicated he was going to dismiss certain charges, such as carjacking and assault. He told the court he would file a new amended information "just for clarity;" "I'll clean it up." He did not mention any change to the robbery charge.

At the same hearing, the parties discussed a summary of the case for the jurors. The trial court suggested, "You can do something like Mr. Thomas is accused on February 5th, 2009, of entering a house with the intent to commit robbery, kidnapping the woman who was there."

The amended information, filed the first day of trial, alleged count 1 as *second degree robbery*. Deleted was the allegation that the crime occurred in an inhabited dwelling house. There is no explanation in the record for this change. Indeed, nothing in the record indicates anyone was even *aware* of the change from first to second degree robbery.

The case was prosecuted as a first degree robbery case without any objection from the defense. In discussing the

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[3] An amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. (*People v. Mack* (1961) 197 Cal.App.2d 574, 578, citing *Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 384-385.)

instructions, the trial court indicated it would give CALCRIM No. 1602, which sets forth the different degrees of robbery. The court so instructed. In closing argument, the People argued, "Not only is the defendant guilty of the burglary and robbery--by the way, these are both first-degree. First degree burglary happens in a house. First degree robbery happens in a house. No question about that. This is a residence, so it's first degree." The defense did not challenge the degree of the robbery, arguing instead that defendant "is not guilty of anything."

The verdict form required the jury to determine if the robbery was first or second degree. The jury found defendant guilty of robbery in the first degree.

At sentencing, in arguing against an aggravated sentence, defendant repeatedly referred to the robbery as occurring in a home, thus conceding the crime of conviction was first degree robbery. He argued, "[I]t's basically a home invasion robbery, a 211 of the home, nothing of the facts of this particular case make it a level of violence any more aggravating than any other normal 211 with a gun." He continued, "[T]here wasn't anything excessive about the violence that wouldn't be found in any 211 at home, and at any 211 at home someone is breaking into the home and robbing the person and in their home."

The court sentenced defendant to the upper term of six years, doubled due to defendant's strike, and then stayed the sentence pursuant to Penal Code section 654 due to the 12-year sentence on first degree burglary.

DISCUSSION

I

Defendant's Conviction for First Degree Robbery

Defendant contends his conviction for first degree robbery must be reduced to second degree because that is the offense alleged in the final charging document. He contends a conviction for a crime greater than that charged is a violation of due process.

"It is fundamental that, 'When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." [Citation.]' [Citation.]" (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368.)

An exception to this rule exists where the defendant expressly or impliedly consents or acquiesces to have the trier of fact consider a substituted, uncharged offense. (*People v. Toro* (1989) 47 Cal.3d 966, 973 (*Toro*), disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438 (*Haskin*).) Consent to conviction of a lesser charge has been found when a defendant requests an instruction on the lesser offense or urges conviction on the lesser. (*People v. Ramirez* (1987) 189

Cal.App.3d 603, 623 (*Ramirez*) disapproved on another point in *People v. Russo* (2001) 25 Cal.4th 1124, 1137.)

A defendant is deemed to acquiesce to the jury's consideration of a lesser related offense when he or she fails to object to the jury instructions or verdict form relating to that offense. (*Toro, supra,* 47 Cal.3d at pp. 976-977.) "[I]t has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Toro, supra,* at p. 976, fn. omitted.)

In requesting instructions for first degree robbery, the prosecutor implicitly amended the information. (See *People v. McGee* (1993) 15 Cal.App.4th 107, 113.) The robbery charge reverted to first degree robbery by the verdict forms and instructions and defendant consented or acquiesced to this change by failing to object or move for a continuance. (*Toro, supra,* 47 Cal.3d at p. 976.) Thus, by the time the case reached the jury, defendant was *again charged* with first degree robbery. Accordingly, there is no due process violation for defendant's conviction of an uncharged crime. At the time he was convicted of first degree robbery, defendant was so charged.

Defendant contends that a failure to object cannot constitute consent when the uncharged offense is greater than

the charged offense. He relies on *Ramirez, supra,* 189 Cal.App.3d 603.[4] In *Ramirez*, defendants were charged with multiple sex crimes; all of the sex crimes included in concert allegations except for two counts of penetration by foreign object. The jury found all of the sex crimes, including the two penetration charges, were committed while acting in concert. (*Ramirez, supra,* at p. 622.) Defendants contended they could not be convicted of penetration by foreign object in concert because it was not charged. The appellate court agreed, reducing the two counts to simple penetration. (*Id.* at p. 624.)

The *Ramirez* court noted that cases involving consent to uncharged offenses all involve lesser offenses. "Conviction for an uncharged greater offense not only raises the problem of notice but makes the inference of consent more difficult, as there is no reason why a defendant should acquiesce in substitution of a greater for a lesser offense." (*Ramirez, supra*, 189 Cal.App.3d at p. 623.) The court found no active acquiescence in the greater charge and declined "to hold that a consent is established by the absence of objection [citation] especially where, as here, appellant could have no incentive to object and risk amendment of the information to charge the greater offense." (*Ramirez, supra,* at p. 624.)

We find this case distinguishable from *Ramirez*. While *Ramirez* conceded that defendants may not have been prejudiced by

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[4] Curiously, the People do not address *Ramirez* in their reply brief.

lack of notice because all the other sex crimes were charged in concert, it pointed out that neither the original nor the amended information charged the penetration counts in concert, suggesting that the in concert allegations were not intended as to those counts. (*Ramirez, supra,* 189 Cal.App.3d at p. 623.) Here, by contrast, there can be no question that defendant had notice of first degree robbery. Due process requires that an accused be advised of the specific charges against him so that he may adequately prepare his defense. (*People v. Thomas* (1987) 43 Cal.3d 818, 823.) All the charging documents, save the last, charged first degree robbery. The change came on the day of trial, by which time defendant had clearly already prepared his defense.

Further, we find suspect the reasoning of the *Ramirez* court that silence by defense counsel in the face of obvious error is excused where counsel has no incentive to object and have the error corrected to his client's detriment. In the sentencing context, parties are required to raise certain issues at trial "to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims." (*People v. Scott* (1994) 9 Cal.4th 331, 351 (*Scott*).) *Scott* "eliminated the 'gotcha' tactic of trial defense counsel in playing possum in the face of the failure of the trial court to articulate a reason for discretionary sentencing choices when such articulation was otherwise required of it." (*People v. Rosas* (2010) 191 Cal.App.4th 107, 114-115 (*Rosas*).) Although this case arises in a different context, we agree with the *Rosas*

court that there is "no principled reason to give trial defense counsel an incentive to snooker the trial judge into giving them a get-a-free-reversal-on-appeal card." (*Rosas, supra,* 191 Cal.App.4th at p. 115, fn. 4.)

Here, nothing indicates defense counsel was even aware of the change in the robbery charge, let alone attempting to "snooker" the trial judge. Instead, the record indicates both the People and defendant tried the case *and proceeded to sentencing* with the belief that the robbery charge was in the first degree. As recounted *ante*, defendant made no objection to the instructions, verdict forms, or argument based on first degree robbery. There was no mention of second degree robbery. Even defendant conceded the degree of robbery at sentencing by reiterating its residential nature. Defendant was charged with, convicted of, and sentenced to first degree robbery, despite the error in the final charging document.[5]

Defendant also relies on *Haskin, supra,* 4 Cal.App.4th 1434. In *Haskin*, defendant admitted the charged one-year enhancement under Penal Code section 667.5, subdivision (b) based on a burglary conviction. In taking this plea, the trial court noted the information in the burglary case alleged that defendant entered a residence, and sentenced defendant, over his

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[5] We reject the People's characterization of the mistake as an immaterial "typographical error." A change in the degree of a crime is significant; for example, in the case of burglary, first degree is a strike while second degree is not. In this robbery case, it causes a significant change to the penalty. (Pen. Code, § 213.)

objection, to a five-year enhancement for a serious felony prior under Penal Code section 667. (*Haskin, supra,* at p. 1437.) On appeal, the court found no consent to the greater enhancement because defendant was not statutorily or factually charged with the greater enhancement and did not consent to its substitution for the one-year enhancement. (*Id.* at p. 1440.) Here, defendant consented to the robbery charge reverting to first degree because he knew of and expected that charge at all times.

Under the specific and unusual facts of this case, we find defendant consented to substituting first degree robbery for the second degree robbery charge in the final information. We find consent not simply due to the lack of objection to the instructions, argument, and verdict forms, but also because the record shows all parties tried the case as if the charge was always first degree robbery.

II

Sentencing Error

Defendant contends the trial court erred in imposing both the one-year state prison term enhancement and the five-year serious prior felony enhancement for the same 2002 residential burglary. The People properly concede the error. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 [when multiple enhancements available for same prior, only greatest applies].) The People contend, and defendant agrees in his reply brief, the proper remedy is to impose and stay the enhancement. (*People v. Lopez* (2004) 119 Cal.App.4th 355, 364; cf. *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1123 [staying lesser firearm enhancement].)

DISPOSITION

The judgment is modified to stay the one-year enhancement imposed under Penal Code section 667.5, subdivision (b) for the 2002 state prison term for first degree burglary. The clerk of the superior court is ordered to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

HULL, J.